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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 BRIAN T. HILL,

12 Petitioner,

13 v.

14 LARRY E. SCRIBNER, Warden,

15 Respondent.
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Civil No. 08-1180 JM (WMc)

ORDER:

(1) **GRANTING APPLICATION TO
PROCEED IN FORMA PAUPERIS; and**

(2) **DISMISSING CASE WITHOUT
PREJUDICE AND WITH LEAVE TO
AMEND**

18 Petitioner, a state prisoner proceeding pro se, has submitted a Petition for Writ of Habeas
19 Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis.

20 **MOTION TO PROCEED IN FORMA PAUPERIS**

21 Petitioner has \$0.00 on account at the California correctional institution in which he is
22 presently confined. Petitioner cannot afford the \$5.00 filing fee. Thus, the Court **GRANTS**
23 Petitioner's application to proceed in forma pauperis, and allows Petitioner to prosecute the
24 above-referenced action without being required to prepay fees or costs and without being
25 required to post security. The Clerk of the Court shall file the Petition for Writ of Habeas
26 Corpus without prepayment of the filing fee.

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FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM

Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner has failed to allege that his state court conviction or sentence violates the Constitution of the United States.

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the United States.” *See* 28 U.S.C. § 2254(a).

Although Petitioner alleges various errors in the resolution of his prison disciplinary proceeding, in no way does Petitioner claim he is “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal habeas claim and then refile the amended petition in this case. He must exhaust state judicial remedies before bringing his claims via federal habeas. State prisoners who wish to challenge their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court judicial remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the

1 Fourteenth Amendment, he must say so, not only in federal court, but in state court.” *Duncan*
 2 *v. Henry*, 513 U.S. 364, 365-66 (1995).

3 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
 4 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
 5 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
 6 to the judgment of a State court. The limitation period shall run from the latest of:

7 (A) the date on which the judgment became final by the
 8 conclusion of direct review or the expiration of the time for seeking
 such review;

9 (B) the date on which the impediment to filing an application
 10 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

11 (C) the date on which the constitutional right asserted was
 12 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 13 applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or
 15 claims presented could have been discovered through the exercise
 of due diligence.

16 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

17 The Court also notes that the statute of limitations does not run while a properly filed state
 18 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003,
 19 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v. Bennett*, 531 U.S. 4,
 20 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
 21 the appropriate court officer for placement into the record] are in compliance with the applicable
 22 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
 23 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167,
 24 181-82 (2001).

25 **FAILURE TO NAME PROPER RESPONDENT**

26 Review of the Petition also reveals that Petitioner has failed to name a proper respondent.
 27 On federal habeas, a state prisoner must name the state officer having custody of him as the
 28 respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28

1 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to
2 name a proper respondent. *See id.*

3 The warden is the typical respondent. However, “the rules following section 2254 do not
4 specify the warden.” *Id.* “[T]he ‘state officer having custody’ may be ‘either the warden of the
5 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
6 institutions.’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
7 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
8 be the state officer who has official custody of the petitioner (for example, the warden of the
9 prison).’” *Id.* (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

10 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
11 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
12 actual person who is [the] custodian [of the petitioner] must be the respondent.” *Ashley v.*
13 *Washington*, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
14 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
15 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
16 of Corrections for California have the power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d
17 at 895.

18 Here, Petitioner has incorrectly named “Larry E. Scribner,” as Respondent. In order for
19 this Court to entertain the Petition filed in this action, Petitioner must name the warden in charge
20 of the state correctional facility in which Petitioner is presently confined or the Director of the
21 California Department of Corrections. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.
22 1992) (per curiam).

23 CONCLUSION


24 Based on the foregoing, the Court **GRANTS** Petitioner’s motion to proceed in forma
25 pauperis and **DISMISSES** this action without prejudice and with leave to amend. To have this
26 case reopened, Petitioner must, **no later than September 15, 2008**, file a First Amended Petition

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1 that cures the pleading deficiencies set forth above. **THE CLERK OF COURT IS**
2 **DIRECTED TO MAIL PETITIONER A BLANK FIRST AMENDED PETITION FORM**
3 **IT IS SO ORDERED.**

4 DATED: July 15, 2008

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6 Hon. Jeffrey T. Miller
United States District Judge